

I'm Gonna Knock You Out: Why Physical Force is a Legitimate Form of Dispute Resolution

CHRISTOPHER IMMORMINO*

I. INTRODUCTION

The Ultimate Fighting Championship (UFC) is a sport that has evolved from “human cockfighting”¹ to a billion-dollar industry with a television audience in 175 countries² and aspirations to expand into China³. The sport is unique because it allows fighting enthusiasts to watch two competitors with different fighting styles compete against each other.⁴ UFC has grown rapidly and is now the biggest Pay-Per-View franchise in history.⁵ UFC also has a unique dispute resolution clause in the contract between brothers Lorenzo Fertitta and Frank Fertitta III, who each own 40.5% of Zuffa, LLC (the parent company of UFC).⁶ According to its terms, any dispute between the Fertitta brothers will be resolved by a “sport jiu-jitsu” match with UFC

* J.D. Candidate, The Ohio State University Moritz College of Law, May 2012. I would like to thank my family and friends for their support throughout the Note writing process. I would also like to thank everyone on the *Ohio State Journal on Dispute Resolution* for all of their help. Specifically, I would like to thank Joseph Stulberg, my Comparative Dispute Resolutions and Negotiations professor, for introducing me to the world of dispute resolution, and Valerie Sayers, my Advanced Fiction Writing professor at the University of Notre Dame, for encouraging me to continue writing after graduation. Finally, I would like to dedicate my note in loving memory of my sister, Allison Immormino (Feb. 8, 1985–Oct. 18, 2011).

¹ David Plotz, *Fight Clubbed*, SLATE, Nov. 17, 1999, <http://www.slate.com/id/46344>.

² Mark Emmons, *Ultimate Fighting Championship is Becoming a Cultural Phenomenon*, THE BULLETIN (Oregon), Aug. 6, 2010, available at http://bendbulletin.com/apps/pbcs.dll/article?AID=/20100806/NEWS0107/8060395/1013/SPORTS&nav_category=SPORTS.

³ Michael Kearns, *Ultimate Fighting Championship Takes Aim at World's Biggest Sports Market*, CNBC, http://www.cnbc.com/id/40017173/Ultimate_Fighting_Championship_Takes_Aim_at_World_s_Biggest_Sports_Market (last visited Mar. 6, 2011).

⁴ Plotz, *supra* note 1.

⁵ Dave Meltzer, *Minority Interest Sold in UFC Parent Company*, YAHOO!, <http://sports.yahoo.com/mma/news?slug=dm-ufcsale011210> (last visited Mar. 6, 2011).

⁶ *Id.*

president Dana White as the referee.⁷ This raises the question: should a fight be considered a legitimate form of dispute resolution?

This note takes the position that a mutually agreed upon competition can be considered a legitimate form of dispute resolution. The note supports the jiu-jitsu clause included in the contract signed between the Fertitta brothers. However, the same concept can be applied to most other one-on-one competitions, such as basketball, tennis, racquetball, a push-up contest,⁸ or a video game competition.⁹ The first section of the note examines historical examples of physical force being used to resolve disputes and how these forms of resolution have fallen out of favor with the public because of their violent nature, lack of fairness, and the likelihood of resultant injury or death. The second section examines today's society's acceptance of a certain level of violence, as evidenced by the emergence of mixed martial arts (MMA), specifically UFC, after the sport adopted rule changes that ensured the safety of participants. The third section examines the use of sport jiu-jitsu as a form of dispute resolution and demonstrates its similarity to arbitration. The fourth section applies common arbitration rules to sport jiu-jitsu and makes the case that a safe, acceptable form of violent competition can be used to settle a dispute as long as basic fairness tenets are met during the negotiation and execution of the agreement. Fairness tenets include disclosure, a neutral party to be the referee, sufficient training time, safety precautions, and the ability to cancel the contest if an injury before the dispute resolution fight occurs

⁷ Mike Sager, *The Boss*, ESQUIRE, Feb. 2010, Vol. 153 Issue 2, pp. 58-106. The Fertitta brothers have yet to invoke this clause. John Rocha, *Fertitta Brothers Grappling to Decide Direction of UFC?*, CAGED INSIDER, <http://www.cagedinsider.com/ufc/news/fertitta-brothers-grappling-decide-direction-ufc/> (last visited Mar. 6, 2011).

⁸ Taylor Lautner, one of the actors in the *Twilight* series of movies, refused an offer to settle a lawsuit with an RV dealership through a push-up competition. Kevin Underhill, *The Push-Up Contest: Today's Trial By Combat?*, FORBES, (Sep. 17, 2010, 6:00 AM), <http://blogs.forbes.com/kevinunderhill/2010/09/17/the-push-up-contest-todays-trial-by-combat/>.

⁹ Bethesda Softworks, LLC, creators of the popular *Elder Scrolls* franchise, sued Mojang AB, creators of *Minecraft*, for trademark infringement over the title of Mojang's new game, *Scrolls*. Jason Schreier, *Minecraft Maker Jokingly Calls Quake Challenge a 'Poor Choice,' Vows to Fight*, WIRED, (August 18, 2011, 6:08 PM) <http://www.wired.com/gameline/2011/08/minecraft-bethesda-lawsuit/>. Marcus Persson, Mojang's founder, challenged Bethesda to a competition in the first-person shooter video game *Quake III*. *Id.* After realizing that Bethesda has professional *Quake* players on its payroll, Persson realized that "[i]n retrospect, *Quake III* might have been a poor choice." *Id.*

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

that would make the form of dispute resolution unfair. The fifth section applies the fairness analysis to the contract between the Fertitta brothers. The dispute resolution clause in the contract between the Fertitta brothers is a legitimate form of dispute resolution, and the result of their sport jiu-jitsu match should be binding on the parties.

II. HISTORICAL EXAMPLES OF DISPUTES SOLVED BY PHYSICAL FORCE

Solving disputes by physical force is not a new concept. Historical examples of physical dispute resolution include trials by battle and duels. However, both of these forms of dispute resolution are no longer used. Trials by battle are no longer used because they can be unfair to an unwilling participant, and duels are no longer used because society has shunned the practice.

A. *Trials by Battle*

Trials by battle, also called trials by combat or judicial combat,¹⁰ were introduced to England by King William I after the Norman Conquest in 1066.¹¹ Under this judicially-sanctioned system, the belief was that the two parties would fight and God would give victory to the party that was right.¹²

The accused was the party that chose whether to invoke a trial by battle.¹³ After the party was sued, the accused had a choice: the accused could choose trial by battle and fight the opponent, or the accused could choose to face the jury.¹⁴ The rationale behind this was to give the accused the choice of being judged by country (trial by jury) or judged by God (trial by battle).¹⁵ Once the accused invokes a trial by battle, the accuser must either fight or concede.¹⁶

The use of trial by battle to settle disputes over land allowed owners of large tracts of land to have many champions (people who will fight on a

¹⁰ BLACK'S LAW DICTIONARY 1645 (9th ed. 2009).

¹¹ *Trial by Combat: West's Encyclopedia of American Law*, available at <http://www.answers.com/topic/trial-by-combat>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See *Ashford v. Thornton*, 106 Eng. Rep. 149 (K.B. 1818).

party's behalf) waiting to settle disputes that might arise.¹⁷ This allowed wealthy landowners to have talented champions to defeat challenges.¹⁸

Trials by battle were not universally accepted by the courts. In an Irish murder case, one of the parties insisted on a trial by battle.¹⁹ The two parties ultimately compromised and settled on a guilty plea, but the thought of a trial by battle horrified one of the judges.²⁰ He rhetorically asked:

Can it be possible that this "[trial by] battle" is seriously insisted on? Am I to understand this monstrous proposition as being propounded by the bar—that we, the judges of the Court of King's Bench—the recogni[z]ed conservators of the public peace, are to become not merely the spectators, but the abettors of a mortal combat? Is that what you require of us?²¹

In England, Parliament failed several times to abolish the trial by battle.²² Trials by battle were seen as obsolete, even though the practice was still an option for a defendant.²³ The practice ended shortly after the case *Ashford v. Thornton*.²⁴ This case involved the alleged savage murder of a young girl named Mary Ashford.²⁵ To some, there appeared to be overwhelming evidence pointing to the guilt of Abraham Thornton.²⁶ However, a jury acquitted Thornton for the murder of Ashford, in part due to eleven witnesses able to establish an alibi.²⁷ After the acquittal, William Ashford, Mary's eldest brother, brought a civil suit against Thornton.²⁸ William was described as a "plain, country young man" and "of short stature."²⁹ Thornton was described as "a stout, well-looking young man,

¹⁷ *Id.*

¹⁸ *Trial by Combat: West's Encyclopedia of American Law*, *supra* note 11.

¹⁹ ROBERT EDGER MEGARRY, A NEW MISCELLANY-AT-LAW: YET ANOTHER DIVERSION FOR LAWYERS AND OTHERS 62–63 (Bryan A. Garner ed., .2005).

²⁰ *Id.* at 63.

²¹ *Id.* (citation omitted).

²² *Id.* at 62. Parliament attempted to eliminate the practice between 1620 and 1641, in 1770, and in 1774, but these attempts were unsuccessful. *Id.*

²³ *Id.*

²⁴ *Ashford v. Thornton*, *supra* note 16.

²⁵ *Id.*

²⁶ MEGARRY, *supra* note 19, at 68.

²⁷ *Id.*

²⁸ *Id.* at 69.

²⁹ *Id.*

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

about five-feet-seven inches tall,” as well as “a powerful and dangerous brute.”³⁰ At the Court of King’s Bench, Thornton pleaded, “Not guilty; and I am ready to defend the same with my body,” and threw down a large gauntlet.³¹ The court agreed that Thornton had this right.³² This forced Ashford to choose one of two options: (1) accept the challenge of a trial by battle and risk his life against the larger opponent, or (2) drop the case. Ashford was not willing to risk his life to achieve justice, so he dropped the case.³³ Thornton was subsequently discharged.³⁴ One of the judges commented that, “It is [the judge’s] duty to pronounce the law as it is, not as we might wish it to be.”³⁵ Another judge said that it is “inconvenient” that “the party that institutes [a civil suit for murder] must be willing, if required, to stake his life in support of his accusation.”³⁶

After this unjust decision, trials by battle were officially ended during the reign of King George III.³⁷ The Act of 1819³⁸ forbade trials by battle.³⁹

B. Duels

Duels have been portrayed in classical texts such as *Hamlet*,⁴⁰ as well as more contemporary works such as *The Simpsons*⁴¹ and *The Princess Bride*.⁴²

³⁰ *Id.*

³¹ *Id.* at 70.

³² MEGARRY, *supra* note 19, at 70.

³³ *Id.* at 71.

³⁴ *Id.*

³⁵ Underhill, *supra* note 8.

³⁶ *Id.*

³⁷ *Trial by Combat: West’s Encyclopedia of American Law*, *supra* note 11. Trials by combat were ended by statute in England in 1819. However, this ritual remains in common law. No court in America has officially overturned the common law precedent of trials by combat. Underhill, *supra* note 8. One could conceivably argue that using physical force as a way to resolve disputes should be legal under trial by battle rationale. This is not the position of this note. This note argues that solving disputes with physical force is substantially different than trials by combat. This is because agreements to solve disputes with physical force require both parties to agree to the form of dispute resolution and the agreements allow for both fairness and safety precautions.

³⁸ MEGARRY, *supra* note 19, at 63 n.31.

³⁹ *Id.* In 1985, two Scottish brothers attempted to invoke a trial by battle after being charged with armed robbery. The Act was determined to apply to the entire United Kingdom. MEGARRY, *supra* note 19, at 67.

⁴⁰ WILLIAM SHAKESPEARE, *HAMLET* act 5, sc. 2. Hamlet and Laertes duel with foils. *Id.* Laertes’ foil was poisoned and killed both participants. *Id.*

Duels grew out of the tradition of trials by battle.⁴³ However, unlike trials by battle (or the rest of the legal system), the purpose of the duel was to defend something that the law could not—a sense of personal honor.⁴⁴

A duel is defined as, “a combat with deadly weapons, pursuant to agreement, without regard to whether any injury results.”⁴⁵ If one of the participants dies as a result of the duel, the killing usually constitutes murder.⁴⁶

During King George III’s reign, there were 172 recorded duels, and probably many more that went unrecorded.⁴⁷ Dueling was also prominent in France and the United States.⁴⁸

The duel usually followed a routine explained in the *Code Duello*.⁴⁹ Each duelist, referred to as a “principal,” would act through another person,

⁴¹ *The Simpsons: E-I-E-I-(Annoyed Grunt)* (FOX television broadcast Nov. 7, 1999). In the episode, Homer Simpson saw a movie that gloriously portrayed duels. *Id.* After his wife, Marge, was pushed by another man in the crowd, Homer slapped the man with a dueling glove and demanded satisfaction in the same fashion as he saw in the movie. *Id.* The man ran away in fear, and Homer realized he could get what he wanted by challenging others to duels. *Id.* Throughout the episode, Homer challenged people to duels to avoid paying at a toll booth, to receive a lollipop from a doctor, to play through on a golf course, and to cut in line at a store. *Id.* A southern gentleman accepted one of Homer’s duels, and the episode ends with Homer being shot in the arm during a duel with pistols. *Id.*

⁴² *THE PRINCESS BRIDE* (Twentieth Century Fox Film Corporation 1987). The movie had several duels, one of which was a duel with swords between Inigo Montoya and the Man in Black. *Id.*

⁴³ *The History of Dueling in America*, PBS, <http://www.pbs.org/wgbh/amex/duel/sfeature/dueling.html> (last visited Sep. 20, 2011).

⁴⁴ Ross Drake, *Duel!*, SMITHSONIAN MAGAZINE, March 2004 at 94–104.

⁴⁵ CHARLES E. TORCIA, 4 WHARTON’S CRIMINAL LAW § 539 (15th ed. 1993).

⁴⁶ *Id.* (citing *State v. Hill*, 20 N.C. (3 & 4 Dev. & Bat.) 629 (1839)) (“[t]he punctilios of false honor, the law regards as furnishing no excuse for homicide. He who deliberately seeketh the blood of another, in compliance with such punctilios, acts in open defiance of the laws of God and of the state, and with that wicked purpose which is termed ‘malice aforethought.’”).

⁴⁷ Drake, *supra* note 44.

⁴⁸ *Id.*

⁴⁹ *Code Duello: The Rules of Dueling*, PBS, <http://www.pbs.org/wgbh/amex/duel/sfeature/rulesofdueling.html>.

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

referred to as the principal's "second."⁵⁰ The second's job was to try to resolve the dispute between the principals before the duel occurred.⁵¹

When one principal felt offended by the other principal, the offended principal would send his challenge to the other principal through his second.⁵² The offender would either resolve the dispute by apologizing to the first principal, or the offender would choose the time, location, and weapons to be used for the duel.⁵³ The offender would be able to apologize, thus ending the feud, up until the duel began.⁵⁴ Once the duel began, the principals would fire at each other either by command, by signal, or at one's pleasure.⁵⁵ After each round, the seconds would urge the principals to mend their differences. The duel would end once the offended party felt that his honor had been restored.⁵⁶ Duelists were required to fire at each other, as intentionally firing in the air was prohibited and considered dishonorable.⁵⁷

Duels were performed with a variety of weapons. Most duelists chose guns.⁵⁸ During the pre-Civil War era, dueling pistols were inaccurate and prone to misfiring.⁵⁹ Because of these characteristics of the weapons, the chances of death were relatively slim.⁶⁰

Many politicians and prominent Americans have dueled, and several have died from the practice. Among those whose lives were lost to duels are Declaration of Independence signer Button Gwinnett, U.S. Senators Armistead T. Mason and David C. Broderick, and rising naval star Stephen Decatur.⁶¹

⁵⁰ *See id.*

⁵¹ *The History of Dueling in America*, *supra* note 43.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Code Duello*, *supra* note 49.

⁵⁶ *The History of Dueling in America*, *supra* note 43.

⁵⁷ *Code Duello*, *supra* note 49 ("The challenger ought not to have challenged without receiving offense; and the challenged ought, if he gave offense, to have made an apology before he came on the ground; therefore, children's play must be dishonorable on one side or the other, and is accordingly prohibited.").

⁵⁸ *The History of Dueling in America*, *supra* note 43.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Drake*, *supra* note 44.

One of the most famous duels was the fatal duel between Aaron Burr and Alexander Hamilton.⁶² Burr was a Republican and Hamilton was a Federalist.⁶³ Their feud lasted many years. Burr was elected to the Senate in 1791, beating Hamilton's father-in-law, Philip Schuyler.⁶⁴ In 1800, Burr found and published a document that Hamilton wrote and intended for a limited audience.⁶⁵ The document was critical of President John Adams.⁶⁶ This document embarrassed Hamilton and further divided the Federalists.⁶⁷

The 1804 New York governor's race caused the feud to become violent.⁶⁸ Burr decided to run as an Independent, and Hamilton campaigned to convince the Federalists not to vote for Burr.⁶⁹ Burr lost the election to Republican Morgan Lewis.⁷⁰

At a dinner party in February of 1804, Hamilton spoke forcefully against Burr.⁷¹ One of the party's attendees wrote a letter to Schuyler about the "despicable opinion" Hamilton had of Burr.⁷² This letter was later published in a New York newspaper.⁷³ Burr sent letters to Hamilton asking for an apology, and he did not receive one that was satisfactory.⁷⁴ This prompted Burr to challenge Hamilton to a duel.⁷⁵ Burr thought the duel would bolster his political career.⁷⁶ Hamilton felt he had no choice—apologizing for what he wrote would result in a loss of honor, and refusing to duel would have the

⁶² *The History of Dueling in America*, *supra* note 43.

⁶³ *Alexander Hamilton and Aaron Burr's Duel*, PBS, <http://www.pbs.org/wgbh/amex/duel/peopleevents/pande17.html> (Last visited Mar. 6, 2011).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Alexander Hamilton and Aaron Burr's Duel*, *supra* note 63.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Charles H. Winfield, *History of the County of Hudson, New Jersey from Its Earliest Settlement to the Present Time* 216–18, available at <http://duel2004.weehawkenhistory.org/winfieldch8duels.pdf>.

⁷⁵ *Id.* at 218.

⁷⁶ *Alexander Hamilton and Aaron Burr's Duel*, *supra* note 63.

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

same effect.⁷⁷ Burr and Hamilton agreed to duel in Weehawken, New Jersey.⁷⁸

During the duel, each man fired once.⁷⁹ It is disputed who shot first.⁸⁰ It is also disputed if Hamilton's gun fired involuntarily after being hit,⁸¹ or if he intentionally fired over Burr's head.⁸² Hamilton's shot missed, but Burr's bullet pierced Hamilton's liver and spine.⁸³ Hamilton died from the injuries.⁸⁴ Burr was subsequently charged with two counts of murder, and his political career declined.⁸⁵

Another famous American who dueled was President Andrew Jackson. He was known as a particularly good duelist.⁸⁶ He participated in more than a dozen duels, but the only man he killed was Nashville attorney Charles Dickenson.⁸⁷ Dickenson was also known as a good duelist, as he had participated in more than two-dozen duels.⁸⁸

The exact cause of the duel between Jackson and Dickenson is unknown. Some believe that the dispute arose out of a horse wager.⁸⁹ Others believe that this duel was caused by Dickenson insulting Jackson's wife, Rachel.⁹⁰

Dickenson shot first and slightly wounded Jackson.⁹¹ Jackson attempted to shoot, but his pistol misfired.⁹² According to the *Code Duello*, this counts

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Winfield, *supra* note 74, at 219.

⁸⁰ *Id.* ("The intervening time is not expressed, as the seconds do not precisely agree on that point.").

⁸¹ *Id.* at 220 ("Hamilton almost instantly fell, his pistol going off involuntarily.").

⁸² JOSEPH J. ELLIS, *THE FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 23–31 (2000). This action is forbidden by the *Code Duello*, *supra* note 49.

⁸³ Winfield, *supra* note 74, at 220.

⁸⁴ *Id.*

⁸⁵ *Alexander Hamilton and Aaron Burr's Duel*, *supra* note 63.

⁸⁶ *The History of Dueling in America*, *supra* note 43.

⁸⁷ Associated Press, *Man Andrew Jackson Killed to be Reburied*, *THE HAROLD DISPATCH* (Huntington, WV), June 24, 2010, available at <http://www.herald-dispatch.com/news/briefs/x1525457073/Man-Andrew-Jackson-killed-in-duel-to-be-reburied>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* Most of the duels that Jackson participated in involved defending his wife's honor. *Id.* His wife was not technically divorced from her previous husband when she remarried. *Id.*

⁹¹ *The History of Dueling in America*, *supra* note 43.

as his shot for this round,⁹³ however, Jackson pulled the pistol's hammer back and fired, killing Dickenson⁹⁴. Jackson's reputation suffered, as some considered this act to be murder.⁹⁵

Duels also began to plague the military forces. Between 1798 and the Civil War, the U.S. Navy lost two-thirds as many men to dueling as it did to actual combat.⁹⁶

Duels were not universally accepted. Even in Shakespeare's time, the causes of duels were satirized.⁹⁷ George Washington and Benjamin Franklin, along with religious and civic officials, were openly against the practice.⁹⁸

After the Civil War, duels began to decline.⁹⁹ People were shocked by the process and others believed duels were just an excuse for cold-blooded murder.¹⁰⁰ Congressman Ambler Smith, when challenged to a duel by George D. Wise, was going to use the opportunity as an excuse for murder by selecting double-barrel shotguns as the dueling weapons.¹⁰¹ To the general public, duels changed from being a means to defend one's honor into an archaism.¹⁰² People also mocked the practice by choosing ridiculous weapons for the duel, such as howitzers, sledgehammers, and forkfuls of pig manure.¹⁰³ These reasons caused the practice of dueling to rapidly decline in America.¹⁰⁴

⁹² *Id.*

⁹³ *Code Duello*, *supra* note 49. ("Rule 20: In all cases, a miss-fire is equivalent to a shot, and a snap or a non-cock is to be considered a miss-fire.")

⁹⁴ *The History of Dueling in America*, *supra* note 43.

⁹⁵ *Id.*

⁹⁶ Drake, *supra* note 44.

⁹⁷ WILLIAM SHAKESPEARE, AS YOU LIKE IT act 5, sc. 4. Touchstone, a fool, discussed the seven degrees of insults that lead to offense: The retort courteous, the quip modest, the reply churlish, the reproof valiant, the counter-cheque quarrelsome, the lie with circumstance, and the lie direct. *Id.* One could avoid a fight for all offenses except the lie direct. *Id.* However, even the lie direct could be lessened by adding the word "if" before it. *Id.* (I would like to thank my good friend Joseph Griesmer for this information.)

⁹⁸ *The History of Dueling in America*, *supra* note 43.

⁹⁹ C. A. Harwell Wells, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America* 54 VAND. L. REV. 1805, 1838 (2001) ("[c]learly, the Civil War killed the duel.").

¹⁰⁰ *The History of Dueling in America*, *supra* note 43.

¹⁰¹ Wells, *supra* note 99, at 1840. Luckily, this duel never occurred. *Id.*

¹⁰² *Id.* at 1841.

¹⁰³ Drake, *supra* note 44.

¹⁰⁴ Wells, *supra* note 99, at 1841.

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

In the nineteenth century, there was a proposed amendment to the Constitution to prohibit duels, but it failed to pass.¹⁰⁵ Today two states have a constitutional prohibition on duels.¹⁰⁶ Nine states have statutes that prohibit everyone in their state from dueling.¹⁰⁷ Eighteen states specifically prohibit members of the military from dueling.¹⁰⁸ Six states prohibit people who participated in duels from holding office.¹⁰⁹ Many states used to have prohibitions on duels, but have since repealed all dueling statutes or constitutional amendments.¹¹⁰ The District of Columbia also repealed its statutory ban on duels in the “Elimination of Outdated Crimes Amendment Act of 2003.”¹¹¹ Some states have ruled that a self-defense justification is not available for duel participants.¹¹² Four states criminalize the publication of a refusal to duel.¹¹³ Additionally, all applicants to the Kentucky Bar must swear that they have not instigated, accepted, or assisted in a duel with deadly weapons.¹¹⁴ Even though many anti-dueling laws existed and some

¹⁰⁵ John R. Vile, *Proposals to Amend the Bill of Rights: Are Fundamental Rights in Jeopardy?*, 75 JUDICATURE 62, 63 (1991).

¹⁰⁶ Arkansas prohibits dueling through its constitution. See Appendix I. Alabama’s constitution specifically allows the legislature to “suppress the evil practice of dueling.” *Id.*

¹⁰⁷ These states are: Colorado, Kentucky, Massachusetts, Michigan, Mississippi, Nevada, New Mexico, Oklahoma, and Rhode Island. *Id.*

¹⁰⁸ These states are: Arizona, Arkansas, Connecticut, Georgia, Hawaii, Iowa, Kansas, Missouri, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Washington, West Virginia, and Wisconsin. *Id.* Arkansas and Oregon prohibit all of its citizens from participating in duels, but they also have a statute specifically forbidding military personnel from dueling. *Id.*

¹⁰⁹ The states are: Kentucky, New York, Oregon, South Carolina, Tennessee, and West Virginia. *Id.*

¹¹⁰ States that once had constitutional amendments banning duels but no longer do include: Colorado, Iowa, Ohio, Texas, and Wisconsin. See Appendix I. States that repealed statutory bans of duels include: California, Florida, Idaho, Illinois, Indiana, Maine, Minnesota, New Jersey, and South Dakota. *Id.* South Carolina repealed its ban on duels, but it did not repeal other statutes related to duels. *Id.* For example, a person faces two years in prison for being a second in a duel, even though the duel itself is not illegal. *Id.*

¹¹¹ See *id.*

¹¹² CHARLES E. TORCIA, 2 WHARTON’S CRIMINAL LAW § 136 (15th ed. 1993); Appendix I. These states are: Arkansas, Delaware, Iowa, New York, and Utah. Appendix I.

¹¹³ These states are: Michigan, Mississippi, Nevada, and Utah. Appendix I.

¹¹⁴ KY. CONST. § 228.

continue to exist today, they have rarely been used since the beginning of the twentieth century.¹¹⁵ Even though dueling is not illegal in most states, duelists must abide by assault and murder laws.

Both trials by battle and duels ceased to be legitimate forms of dispute resolution because of either unfairness or lack of social acceptance.¹¹⁶ For physical confrontation, or more specifically, sport jiu-jitsu to be considered a legitimate form of dispute resolution, the practice needs to avoid the pitfalls of duels and trials by battle: they must remain socially acceptable and ensure fairness.

III. SOCIAL ACCEPTANCE OF UFC

A. UFC's Transformation from Human Cockfighting to Sports Empire

In the 1990s, UFC—much like dueling¹¹⁷—was seen by many politicians as unnecessarily violent.¹¹⁸ The sport marketed itself to viewers by exclaiming, “there are no rules!”¹¹⁹ While technically not true,¹²⁰ UFC encouraged several acts of poor sportsmanship, including kicking an opponent when he is down and hitting an opponent in the groin.¹²¹ Fighters would continue beating on an opponent until, “knockout, submission, doctor’s intervention, or death.”¹²² There were no time limits or weight classes.¹²³ Politicians, led by Senator John McCain, began to crusade against UFC.¹²⁴ The sport was banned in New York and was not sanctioned by the Nevada Athletic Commission, which kept the sport out of the lucrative Las Vegas market.¹²⁵ UFC was further crippled when the National Cable &

¹¹⁵ Wells, *supra* note 99, at 1841.

¹¹⁶ See *id.*; see generally *Ashford v. Thornton*, *supra* note 16.

¹¹⁷ See generally *The History of Dueling in America*, *supra* note 43.

¹¹⁸ Plotz, *supra* note 1.

¹¹⁹ *Id.*

¹²⁰ Biting and eye-gouging were illegal. *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Daniel Schorn, *Mixed Martial Arts: A New Kind of Fight*, CBSNEWS.COM, <http://www.cbsnews.com/stories/2006/12/08/60minutes/main2241525.shtml?tag=contentMain;contentBody> (last visited Mar. 6, 2011). Weight classes ensure that fighters are matched up against opponents that are similar in size.

¹²⁴ Plotz, *supra* note 1.

¹²⁵ *Id.*

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

Telecommunications Association warned cable providers that UFC broadcasts could cost the association political influence.¹²⁶ This led several top cable providers to decide to not air UFC bouts.¹²⁷ UFC was struggling—it could no longer afford its best fighters, and the Pay-Per-View audience had shrunk from 300,000 per fight down to 15,000 in 1999.¹²⁸

In 2001, Dana White and the Fertitta brothers bought UFC for \$2 million.¹²⁹ Under this new ownership, the UFC instituted new rules and cleaned up its image. They instituted time limits and rounds.¹³⁰ UFC followed the rules set out by the New Jersey Athletic Control Board, called the *Mixed Martial Arts Unified Rules of Conduct*.¹³¹ The rules mandated mouthpieces and gloves to ensure safety.¹³² The rules also prevented several dangerous strikes, such as strikes to the spine or back of the head, kicking or kneeing the head of a grounded fighter, or throwing an opponent out of the fighting arena.¹³³ The rules also specified how a fight ends: submission,¹³⁴ technical knockout,¹³⁵ knockout,¹³⁶ or at the end of the final round, with the winner declared via scorecards¹³⁷. After the adoption of the rules, even

¹²⁶ *Id.* The National Cable & Telecommunication Association (formerly known as National Cable Television Association) is “the principal trade organization of the cable industry in the United States,” and represents cable operators representing more than 90% of America’s cable television households. *About NCTA*, NCTA.COM, <http://www.ncta.com/About/About/AboutNCTA.aspx> (last visited September 21, 2011).

¹²⁷ Plotz, *supra* note 1.

¹²⁸ *Id.*

¹²⁹ Sager, *supra* note 7.

¹³⁰ Plotz, *supra* note 1.

¹³¹ *New Jersey Commission Corrects 60 Minutes Story*, MMA WEEKLY, <http://mmaweekly.com/new-jersey-commission-corrects-60-minutes-story-2> (last visited Mar. 6, 2011).

¹³² *Mixed Martial Arts Unified Rules of Conduct*, available at <http://www.state.nj.us/lps/sacb/docs/martial.html>.

¹³³ *Id.*

¹³⁴ A submission occurs when a fighter “taps out.” *Id.* This occurs when the contestant uses his hand to signal to the referee that he or she no longer wishes to continue the fight. *Id.* A tap out can also be signaled to the referee verbally. *Id.*

¹³⁵ A technical knockout occurs when a fight is stopped by the referee or the medical staff, or if a legal strike causes an injury that is severe enough to end the fight. *Id.*

¹³⁶ A knockout occurs when one participant fails to rise from the canvas. *Id.*

¹³⁷ *Id.*

Senator McCain acknowledged the progress of UFC.¹³⁸ He explained, “[t]hey have cleaned up the sport to the point, at least in my view, where it is not human cockfighting anymore.”¹³⁹

After adopting the new rules, UFC gained popularity. In 2009 six of the top ten events on Pay-Per-View were UFC fights, including the top-selling event that year.¹⁴⁰ UFC also created a successful reality TV show called *The Ultimate Fighter*.¹⁴¹ Millions of viewers watched the show.¹⁴² UFC is now estimated to be worth over \$1 billion.¹⁴³

B. How Dispute Resolution via Sport Jiu-Jitsu Can Thrive Where Trials by Battle and Duels Failed

Duels and trials by battle had one prominent feature in common: Death. People who agreed to partake in trials by battle had to “stake his life in support of his accusation.”¹⁴⁴ A person who issued a challenge in a duel was at the mercy of his opponent for the weapon choice.¹⁴⁵ If his opponent chose a lethal weapon, then there was a chance that both parties might die attempting to defend their honor.¹⁴⁶

An agreement to resolve disputes through sport jiu-jitsu is different from trials by battle. An agreement with a sport jiu-jitsu clause requires *both* parties to agree to settle the dispute in the same fashion. This is different

¹³⁸ Robert Siegel, *All Things Considered* (National Public Radio Aug. 24, 2007), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=13901908>.

¹³⁹ *Id.*

¹⁴⁰ Dave Meltzer, *UFC Remains King of the PPV Hill*, YAHOO!, <http://sports.yahoo.com/mma/news?slug=dm-ppvbiz021510> (last visited Mar. 6, 2011). The top UFC fight between Brock Lesnar and Frank Mir was purchased 1.6 million times. *Id.* The second highest purchased event was the boxing match between Manny Pacquiao and Miguel Cotto with 1.25 million purchases. *Id.*

¹⁴¹ Sager, *supra* note 7.

¹⁴² Sergio Non, ‘Ultimate Fighter’ Finale Pulls In 2 Million Viewers, USA TODAY, Jun. 22, 2010, available at <http://content.usatoday.com/communities/mma/post/2010/06/ultimate-fighter-finale-pulls-in-2-million-viewers/1>. The first and second season finales were each watched by 2.7 million viewers, and the third season finale was watched by 2.9 million. *Id.*

¹⁴³ Sager, *supra* note 7.

¹⁴⁴ Underhill, *supra* note 8.

¹⁴⁵ *Code Duello*, *supra* note 49.

¹⁴⁶ Drake, *supra* note 44. Of the 172 recorded duels in England, 69 resulted in fatalities. *Id.*

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

from the trial by battle, where the accusing party is at the mercy of the accused party's decision.¹⁴⁷ For a trial by battle, a party who is physically stronger has an unfair advantage and could insist on a trial by battle in an attempt to get the other party to concede.¹⁴⁸ The mutual agreement necessary for an agreement to resolve disputes through sport jiu-jitsu will eliminate this unfairness. Additionally, the variety of styles of martial arts available in UFC allow for greater equality in the fight, as being a bigger or stronger person does not necessarily ensure victory.¹⁴⁹

Resolving disputes with sport jiu-jitsu is also different from dueling. Although UFC is a violent contact sport, no one has died during competition.¹⁵⁰ There are rules in place to guarantee the relative safety of the participants.¹⁵¹ Unlike duels, UFC matches will not be considered an excuse to commit cold-blooded murder because there are rules in place to ensure safety.¹⁵² Also, many duels used deadly weapons, and fists do not constitute deadly weapons.¹⁵³

Trials by battle failed because the system was unfair.¹⁵⁴ Duels failed because the practice turned into an excuse for murder, which has no place in a civilized society.¹⁵⁵ Resolving disputes with physical force can succeed where trials by battle and duels have failed by remaining socially acceptable. Ensuring both the safety of participants and fairness will help achieve this goal. This can be accomplished with adherence to existing rules and statutes that are designed to ensure safety and fairness during dispute resolution proceedings.

¹⁴⁷ *Ashford*, *supra* note 16, at 169.

¹⁴⁸ This is similar to what happened in *Ashford v. Thornton*, where the stronger party insisted on the trial by battle, and the weaker party could not object. *Id.*

¹⁴⁹ 180-pound jiu-jitsu specialist Royce Gracie defeated 275-pound Dan Severn, who was one of the top heavyweights in the world. Plotz, *supra* note 1. Severn physically beat Gracie for most of the match, but Gracie was able to get Severn into a choke hold, and the larger man tapped out. *Id.* Additionally, a 200-pound kickboxer was able to defeat a 620-pound sumo wrestler in about 35 seconds. *Id.*

¹⁵⁰ Matthew Garrahan and Kenneth Li, *A Fistful of Dollars*, FINANCIAL TIMES (July 15, 2009), available at <http://www.ft.com/cms/s/0/2ca5d42a-7160-11de-a821-00144feabdc0.html#axzz1BbXkjt1g>.

¹⁵¹ See *Mixed Martial Arts Unified Rules of Conduct*, *supra* note 132.

¹⁵² *Id.*

¹⁵³ TORCIA, *supra* note 45 ("If fists only are used, it is not a duel").

¹⁵⁴ See *Ashford*, *supra* note 16.

¹⁵⁵ *The History of Dueling in America*, *supra* note 43.

IV. AN AGREEMENT TO RESOLVE DISPUTES WITH SPORT JIU-JITSU IS MOST SIMILAR TO ARBITRATION

An agreement to resolve disputes via sport jiu-jitsu will involve two opponents fighting for his side to win. The winner of the match will win the dispute, and the decision will be binding on both parties. This is most similar to arbitration.

Arbitration is “a method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding.”¹⁵⁶ In an arbitration proceeding, each side agrees that the parties will accept the decision of the arbitrator as final.¹⁵⁷ During the arbitration proceeding, each side argues their case to the arbitrator.¹⁵⁸ The arbitrator considers the evidence and determines the winning side.¹⁵⁹ The decision is binding on both parties.¹⁶⁰ Arbitration is usually less expensive and faster than a trial.¹⁶¹

Mediation is another form of dispute resolution. Mediation is a method of dispute resolution where a neutral third party acts as a facilitator to help the disputing parties achieve a mutually agreeable solution.¹⁶² In mediation, the two sides typically meet and state their respective positions to each other in the presence of the mediator.¹⁶³ The mediator then separates the parties and meets with each party privately.¹⁶⁴ The mediator uses these meetings to develop options for settlement. Mediators generally do not take sides or judge the case.¹⁶⁵ The role of the mediator is to facilitate a discussion

¹⁵⁶ BLACK’S LAW DICTIONARY 119 (9th ed. 2009).

¹⁵⁷ Arbitration, The Free Dictionary, <http://legal-dictionary.thefreedictionary.com/arbitration>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* Arbitration is also referred to as “binding arbitration.” BLACK’S LAW DICTIONARY 119 (9th ed. 2009).

¹⁶¹ *Arbitration 101: The Basics of Arbitration*, <http://www.adrforum.com/users/naf/resources/arb%20101-21.pdf> (last accessed Sep 20, 2011).

¹⁶² BLACK’S LAW DICTIONARY 1071 (9th ed. 2009).

¹⁶³ Michael Roberts, *Why Mediation Works*, <http://www.mediate.com/articles/roberts.cfm> (last visited Jun. 26, 2011).

¹⁶⁴ *Id.*

¹⁶⁵ Leonard P. Reina, *Mediation vs. Arbitration vs. Litigation: What’s the Difference?*, <http://library.findlaw.com/1999/Jun/1/129206.html> (last visited on Mar. 6, 2011).

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

between the parties in an effort to come to a mutually acceptable resolution.¹⁶⁶ It is not the role of the mediator to determine a winner or loser.¹⁶⁷ Mediations are traditionally non-binding.¹⁶⁸

Under the terms of the contract between the Fertitta brothers, if the Fertitta brothers invoke the dispute resolution clause of their contract, they will be on opposing sides.¹⁶⁹ One of the parties will win the bout, either by decision or stoppage by the referee.¹⁷⁰ By contract, the Fertitta brothers agree that the result of the fight will be binding.¹⁷¹ The Fertitta brothers are not fighting to reach a mutually-agreeable solution to the dispute.¹⁷² Instead, they are fighting to enforce their position on the dispute.¹⁷³ The referee or judges must choose a winner or loser.¹⁷⁴

This form of dispute resolution is most similar to arbitration. The Fertitta brothers will select a person to serve as a neutral party to resolve their dispute, much like an arbitrator.¹⁷⁵ The decision will be binding on the parties.¹⁷⁶ The method of dispute resolution differs from traditional arbitration only because the participants are physically fighting instead of resolving the dispute verbally.

The contract differs significantly from mediation. The referee of the fight will not be attempting to facilitate discussions between the parties, but rather ensure a fair fight and determine a winner.¹⁷⁷ Also, mediations are traditionally non-binding on the parties, and the result of the fight between the Fertitta brothers will be binding.¹⁷⁸

Because this form of dispute resolution is most similar to arbitration, the rules of arbitration should be used as guidance. If safety and fairness are ensured, sport jiu-jitsu must be considered a legitimate form of dispute

¹⁶⁶ See Roberts, *supra* note 163.

¹⁶⁷ See *id.*

¹⁶⁸ See Reina, *supra* note 165.

¹⁶⁹ See Sager, *supra* note 7.

¹⁷⁰ *Mixed Martial Arts Unified Rules of Conduct*, *supra* note 132.

¹⁷¹ Sager, *supra* note 7.

¹⁷² See *id.*

¹⁷³ *Id.*

¹⁷⁴ *Mixed Martial Arts Unified Rules of Conduct*, *supra* note 132.

¹⁷⁵ Dana White will be the referee for the fight. Sager, *supra* note 7.

¹⁷⁶ See *id.*

¹⁷⁷ See generally *id.*

¹⁷⁸ See Sager, *supra* note 7.

resolution. To determine otherwise would be denying the right of the parties to freely negotiate contract terms.

V. SAFETY AND FAIRNESS REQUIREMENTS

The Federal Arbitration Act requires that the arbitration process be fundamentally fair.¹⁷⁹ To ensure fairness when resolving disputes with a sport jiu-jitsu match, the parties need to take into account several factors. These factors are: Mutual voluntary agreement to arbitrate by physical force, a fair referee and fair judges, fair time for preparation and training, disclosure of previous fighting experience, and safety precautions.

A. Mutually Agreed Dispute Resolution Clause

Some contracts have mandatory arbitration clauses.¹⁸⁰ Some of these mandatory arbitration clauses create a significant burden on the party who is forced to sign the contract on a take-it-or-leave-it basis.¹⁸¹ Some of these contracts are considered unconscionable.¹⁸² For an agreement to arbitrate via sport jiu-jitsu to be valid, the agreement cannot be on a take-it-or-leave-it basis. Each side needs to voluntarily agree to this term.

An agreement to arbitrate is valid and enforceable unless there is a reason, in law or in equity, to not enforce the agreement.¹⁸³ A mandatory sport jiu-jitsu arbitration clause would be very similar to a trial by battle, where one party can force the other party into the use of physical force.¹⁸⁴ A mandatory arbitration clause through a sport jiu-jitsu match should not be

¹⁷⁹ 9 U.S.C. § 10(a) (1925).

¹⁸⁰ An example of this type of arbitration clause exists in many credit card contracts. Amy Buttell Crane, *Credit Card Arbitration: What it is, How it Works*, <http://www.creditcards.com/credit-card-news/credit-card-arbitration-1282.php> (last visited Mar. 7, 2011).

¹⁸¹ For an analysis on the unconscionability of mandatory arbitration clauses, see Katie Jory, Note, *Mandatory Arbitration Clauses in Payday Lending Loans: How the Federal Courts Protect Unfair Lending Practices in the Name of Anti-Protectionism*, 24 OHIO ST. J. ON DISP. RESOL. 315 (2009).

¹⁸² *Id.*

¹⁸³ 9 U.S.C. § 2 (1925); UNIF. ARBITRATION ACT § 6(a) (2000).

¹⁸⁴ *Ashford v. Thornton*, *supra* note 16. Without mutual agreement, solving disputes with physical force, much like trials by battle, will force a person to stake one's physical well-being in support of his accusation or withdraw the claim. This was shocking to the judges in *Ashford v. Thornton*. See Underhill, *supra* note 8.

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

enforced because it could cause the same unfair dilemma that occurred in *Ashford v. Thornton*, where a much weaker opponent is required to either risk serious injury or death, or drop the case.¹⁸⁵ By contrast, such a clause should be enforced if it is demonstrated that its terms were voluntarily accepted by the parties.

B. Referees and Judges as Arbitrators

When two parties agree to resolve their dispute with a sport jiu-jitsu match, the match must have both a referee and judges.¹⁸⁶ The referee and judges will have the same function as an arbitrator during an arbitration proceeding.¹⁸⁷ The final decision will be made either by the referee or the judges.¹⁸⁸

The selection of the referee and judges must be fair. The parties can agree to the selection process and voluntarily choose the referee and judges.¹⁸⁹ The Fertitta brothers mutually agreed that Dana White will be the referee.¹⁹⁰

The parties will need to select a referee and judges who will be impartial during the match.¹⁹¹ The parties can identify the referee and judges in the contract. The referee and judges should disclose any facts that a reasonable person would consider likely to affect the partiality of the referee or

¹⁸⁵ See *Ashford*, *supra* note 16. See also 9 U.S.C. § 2 (1925); UNIF. ARBITRATION ACT § 6(a) (2000).

¹⁸⁶ While it is conceivable that a match could occur without a referee and judges, this would not conform to the *Mixed Martial Arts Rules of Unified Conduct*, *supra* note 132. If the parties do not follow the *Mixed Martial Arts Rules of Unified Conduct*, resolving disputes with sport jiu-jitsu might be viewed as senseless violence that should be shunned by society—much like the practice of dueling.

¹⁸⁷ Think of the referee and the judges as members of two separate arbitration panels. The referee will resolve the dispute if there is a decision by knockout, technical knockout, or submission. *Id.* If one of these conditions is met, then the judges' tallies are moot, and the decision of the referee is final. *Id.* If none of these conditions are met, the referee will no longer be the controlling arbitrator. See *id.* The judges will then have the power to resolve the dispute via scorecards. *Id.*

¹⁸⁸ The referee has the power to stop the fight and declare a winner under certain circumstances. *Id.* The judges will decide the winner if there is no winner when the final round ends. *Mixed Martial Arts Rules of Unified Conduct*, *supra* note 132.

¹⁸⁹ UNIF. ARBITRATION ACT § 12 cmt. 1 (2000).

¹⁹⁰ Sager, *supra* note 7.

¹⁹¹ 9 U.S.C. § 10(a)(2) (1925); UNIF. ARBITRATION ACT § 12(a) (2000).

judges.¹⁹² This includes, but is not limited to, a personal or financial stake in the outcome of the fight, or a past personal relationship with one or both of the parties.¹⁹³ This disclosure would allow the parties to assess whether the referee or judges can be impartial and fair during the dispute.

If the parties do not select a referee or do not have a referee-selection clause in their contract when the contract is signed, then Section 5 of the Federal Arbitration Act should govern the dispute.¹⁹⁴ This would allow one of the parties to ask the court to assign an impartial referee.¹⁹⁵ If the parties wish to avoid the court's involvement, both sides should agree to include a clause in the contract that specifies the referee. If there is a clause explaining how the referee or judges will be selected, then it will be used.¹⁹⁶ The parties do not need to specify the individual who will arbitrate. An example would be a clause that allows one party to select the referee, and the other party has the right to refuse the referee, but neither party will refuse a referee without a good faith reason for excluding that referee.

If one of the parties believes that the referee or judges were not impartial during the fight, the result of the fight can be vacated. The court has the power to vacate any decision if there is evidence of partiality or corruption by the referee or judges.¹⁹⁷ The court can also vacate the decision if there is evidence of fraud or corruption during the fight.¹⁹⁸ Parties who use sport jiu-jitsu as a form of dispute resolution should be especially careful to guarantee that judges and referees are impartial if they want a quick resolution because scheduling a rematch will take time. Fighters who are defeated by knockout cannot compete for sixty days.¹⁹⁹ Fighters who are defeated by technical knockout cannot compete for thirty days.²⁰⁰ Because participants might need to wait a significant amount of time for a rematch with an impartial referee, they should be careful to ensure that the referee is neutral for the first bout.

An arbitrator is required to inform the parties of his fees before arbitration begins.²⁰¹ In order to guarantee that the sport jiu-jitsu match runs

¹⁹² UNIF. ARBITRATION ACT § 12(a) (2000).

¹⁹³ *Id.* § 12(a)(1)–(2).

¹⁹⁴ 9 U.S.C. § 5 (1925); UNIF. ARBITRATION ACT § 11(a) (2000).

¹⁹⁵ *Id.*

¹⁹⁶ UNIF. ARBITRATION ACT § 11(a) (2000).

¹⁹⁷ 9 U.S.C. § 10(a)(2) (1925); UNIF. ARBITRATION ACT § 23(a)(2) (2000).

¹⁹⁸ 9 U.S.C. § 10(a)(1) (1925).

¹⁹⁹ N.J.A.C. § 13:46 12A.11 (2010).

²⁰⁰ N.J.A.C. § 13:46 12A.12 (2010).

²⁰¹ 9 U.S.C. § 7.

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

smoothly, the referee and judges need to make sure that the parties know their fees before the event.

Unlike other arbitration proceedings, the referee and judges involved in resolving a dispute through sport jiu-jitsu do not need to know the positions of the parties. The parties are not arguing their legal theory to the referee or judges. The referee and judges do not even need to know the specifics of the dispute. Because of this, the referee and judges do not need to be knowledgeable of the legal issue in question. They do, however, need to be experts in the rules of the *Mixed Martial Arts Rules of Unified Conduct*. If the referees or judges do not know about the content of the dispute, they are less likely to be partial based on a desired outcome.

C. Fair Time for Preparation and Training

The Federal Arbitration Act does not give a specific time in which the arbitration proceedings are to occur.²⁰² But, the Uniform Arbitration Act specifies that when an arbitrator orders a hearing, the arbitrator must give “not less than five days [notice] before the hearing begins.”²⁰³ Should this same provision apply, or would it be better if the parties set the fight date by mutual agreement?

1. The Argument for Scheduling the Fight for a Future Date

In order for this form of dispute resolution to be valid, the dispute must be fair.²⁰⁴ Allowing the parties to set a date would help ensure this type of fairness. If it is decided that the parties will fight at a specified time after the dispute arises (for example, the parties decide that a fight will occur two months after the dispute arises), this would give each party enough time to train for the fight. For example, UFC icon Chuck Liddell ideally trains six to eight weeks before his scheduled bout.²⁰⁵ This type of training time would help ensure that each party is given the opportunity to get into peak physical condition for the sport jiu-jitsu match.

²⁰² See *id.*

²⁰³ UNIF. ARBITRATION ACT § 15(c) (2000).

²⁰⁴ 9 U.S.C. § 10(a)(3) (1925).

²⁰⁵ Cliff Montgomery, *Learning from Chuck Liddell*, http://www.extremeprosports.com/full_contact_fighting/chuck_liddell.html (last visited Mar. 31, 2011).

As in any arbitrable dispute, when to invoke the clause can be strategic and result in an unfair match. For example, if a party has an arbitrable dispute that arises at the beginning of November, the party might begin training for the impending fight without giving notice of the dispute to the opponent. The party might also wait until after Thanksgiving and the winter holidays to invoke this clause, hoping that their opponent gained a few extra pounds by feasting on holiday meals.²⁰⁶ Requiring ample training time between notice of the dispute and scheduling of the fight would reduce this risk.

2. The Argument for Starting the Fight Five Days After the Dispute Arises

The biggest advantage for fighting five days after a dispute arises is speed. One reason that people choose to arbitrate is because of the speed of the procedure.²⁰⁷ If the dispute between the parties needs to be resolved quickly, then the parties might not want to delay the fight for training time. Sport jiu-jitsu matches occur very quickly.²⁰⁸ The parties' negotiated decision to place speed of resolution over training time would be respected, but the parties need to be concerned with fairness.

An agreement that does not provide for delaying the fight for training time is still fair because the parties knowingly entered the contract. The parties agreed to the terms of the dispute resolution clause. The parties know that any time a dispute arises they may be required to fight. The parties should, therefore, be ready to fight at any time. Because both parties entered the agreement voluntarily and with knowledge of the provision, the parties should be actively training and preparing for a potential sport jiu-jitsu match. Moreover, if a party chooses not to train, that choice should be respected and the party should not be permitted to cry foul.

In order to ensure fairness, the parties should be permitted to schedule the fight. This is especially true if one of the parties requires a delay because

²⁰⁶ The average American gains the most weight in the six-week period between Thanksgiving and New Years Day. Laura Cone, *Holiday Weight Gain Statistics, Latest Research*, http://www.associatedcontent.com/article/5908696/holiday_weight_gain_statistics_latest.html (last visited Mar. 6, 2011).

²⁰⁷ *Arbitration 101: The Basics of Arbitration*, *supra* note 161.

²⁰⁸ See *Mixed Martial Arts Unified Rules of Conduct*, *supra* note 132 ("Each non-championship mixed martial arts contest shall be three rounds, of five minutes duration, with a one minute rest period between each round.").

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

of injury.²⁰⁹ This is because resolving disputes via sport jiu-jitsu needs to take into account the physical health of the participants. If one of the parties is injured or otherwise not physically ready to fight, the fight must be postponed to promote fairness.²¹⁰ If the parties are each physically able to fight, the fight must occur within the terms of the agreement.²¹¹

D. Unique Disclosure Requirements

The decision to resolve disputes via sport jiu-jitsu creates unique disclosure problems. If one party has previously trained in a form of martial arts, fairness and safety require that fact to be disclosed.²¹² This is especially true when one considers what is at stake in the fight—not just the resolution of the dispute, but also the health and well-being of the participants involved.²¹³ Because of the potential health risk from competing in a sport

²⁰⁹ 9 U.S.C. § 10(a)(3) (1925) (“[T]he United States court . . . may make an order vacating the award . . . where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . .”).

²¹⁰ The *Mixed Martial Arts Rules of Unified Conduct* cite to N.J.A.C. § 13:46-12(B) to ensure the health of the fighters. *Mixed Martial Arts Rules of Unified Conduct*, *supra* note 132. In subsection 12(B)(5)(a), the regulation requires an injured party to notify the Commissioner if the fighter is unable to fulfill his contractual duty due to the injury. *Id.* Since there is no commissioner for these fights, fairness would require notifying the opposing party and the referee of the injury. The parties should defer to the medical experts to determine if a party is too injured to fight. The fight should not occur until the party is cleared to fight by a medical expert.

²¹¹ 9 U.S.C. § 206 (1925). The court is allowed to compel arbitration in accordance with the agreement. *Id.* If each party is healthy enough to participate, the fight should occur within the terms of the agreement.

²¹² The contract to arbitrate via sport jiu-jitsu without knowing about the opposing party’s past martial arts training could be voidable under the contract theory of unilateral mistake. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 151–153 (1981). This type of contract might also be voidable because the court will not enforce an arbitration agreement if there is a reason in law or in equity to not enforce the arbitration agreement. 9 U.S.C. § 2 (1925); UNIF. ARBITRATION ACT § 6(a) (2000).

²¹³ While the chance of critical injuries are generally low, a study of 1,270 MMA fights in the state of Nevada from 2002–2007 revealed that 23.6% of fighters were injured during competition. Ka Ming Ngai, Frederick Levy & Edbert B. Hsu, *Injury Trends in Sanctioned Mixed Martial Arts Competition: A Five-Year Review 2002-2007*, BRITISH JOURNAL OF SPORTS MEDICINE, Mar. 4, 2008, at 686–89. The most common injuries were cuts or upper extremity injuries. *Id.* 1.65% of fighters received severe concussions. *Id.* This study involved professional fighters competing against other professional fighters. *Id.* My theory (one that will almost certainly go untested because of

jiu-jitsu match, the two parties must be required to disclose previous training prior to the agreement to arbitrate. If one party is trained and the other party is not, the untrained party can still choose to participate. At this point, the untrained party knows of one's opponent's proficiency in martial arts or other skills and can choose to voluntarily subject himself to the fight. The party cannot later claim that the agreement was unfair or invalid because he or she was unaware of the opponent's strengths.²¹⁴

E. Safety Precautions

The parties are agreeing to a sport jiu-jitsu match, not a street fight. There are rules that need to be followed to ensure the safety of the participants. These rules are explained in the *Mixed Martial Arts Rules of Unified Conduct*.²¹⁵ These rules mandate protective gear and prevent tampering with equipment.²¹⁶ The rules require a stoppage if a mouthpiece is knocked out of a fighter's mouth.²¹⁷ Additionally, penalties are assessed for illegal actions that could cause injury.²¹⁸ If an illegal act is performed, the referee must call time, check the fouled participant's condition, assess the foul to the offending contestant, and deduct points.²¹⁹ Additionally, the fouled participant will have five minutes to recover from the foul.²²⁰ If one of the participants is injured and not able to continue, the referee will stop the fight to prevent further injury.²²¹

ethical reasons) is that a trained fighter competing against an untrained fighter would significantly increase the chance of a severe injury.

²¹⁴ After a party's disclosure, there would no longer be a belief that is not in accord with the facts. See RESTATEMENT (SECOND) OF CONTRACTS § 151 (1983).

²¹⁵ *Mixed Martial Arts Unified Rules of Conduct*, *supra* note 132.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* Examples of illegal hits include headbutting, eye gouging, biting, spitting on an opponent, hair pulling, fish hooking, groin attacks of any kind, intentionally placing a finger in any opponent's orifice, downward pointing elbow strikes, small joint manipulation, strikes to the spine or back of the head, heel kicks to the kidney, throat strikes, kicking or kneeing the head of a grounded fighter, stomping on a grounded fighter, throwing an opponent out of the fighting area, flagrant disregarding of the referee's instructions, or spiking an opponent to the canvas on his head or neck. *Id.*

²¹⁹ *Id.*

²²⁰ *Mixed Martial Arts Unified Rules of Conduct*, *supra* note 132.

²²¹ *Id.*

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

The rules require the presence of emergency medical technicians.²²² The rules also specify that an ambulance must be present during a fight.²²³ These precautions will ensure that a participant is promptly treated for serious injuries.

F. Termination

The parties should be aware that a scenario might arise when a party is no longer physically able to fight. For example, if a party suffers a serious injury, a fight might not be practicable for years, if ever. Because a contractual resolution via sport jiu-jitsu match requires the participants to be in good physical shape (unlike an arbitration proceeding, where the parties need someone with a sharp mind), the parties should foresee the possibility that a sport jiu-jitsu match may become impracticable.

If a party is injured, the fight must be postponed until the injured party has recovered. If the fight is not postponed, the award can be vacated.²²⁴

The parties should have a clause in the contract that will go into effect if a sport jiu-jitsu match becomes impracticable. The parties would be free to choose how they want to settle the dispute through other legal means, such as a court proceeding or other form of dispute resolution that does not involve physical force. If the contract contains a provision that forces an injured party to concede, then the contract provision should be considered unfair, much like trials by battle.²²⁵

VI. APPLICATION TO THE FERTITTA BROTHERS' CONTRACT

The dispute resolution clause in the contract between Frank and Lorenzo Fertitta has yet to be invoked.²²⁶ If it is invoked, it should be considered a legitimate form of arbitration because it follows the fairness precautions outlined in the previous section.

²²² N.J.A.C. § 13:46 12A.17 (2010).

²²³ *Id.* § 13:46 12A.16 (2010).

²²⁴ UNIF. ARBITRATION ACT § 23(a)(3) (2000).

²²⁵ See *Ashford v. Thornton*, *supra* note 16. The injured party should not be at the mercy of his opponent's exploitation of the injury because of this clause.

²²⁶ Rocha, *supra* note 7.

Frank and Lorenzo Fertitta voluntarily and mutually agreed to this clause in their contract.²²⁷ Because the clause in the contract was not mandatory, but rather was voluntarily and knowingly created by both parties, the clause should not be considered unconscionable.²²⁸ This clause was agreed to by both parties at its formation, so the Fertitta brothers' contract will avoid the stigma that accompanied trials by battle.²²⁹

The Fertitta brothers agreed to partake in a sport jiu-jitsu match.²³⁰ These matches have rules and regulations to ensure the safety of participants.²³¹ Assuming the Fertitta brothers will be fighting under a set of rules written by the New Jersey Athletic Control Board,²³² the chance of a serious or life-threatening injury will be slim.²³³ Because there are rules that ensure the safety of the participants, the dispute resolution clause should be considered legitimate.

The Fertitta brothers are both partners at UFC.²³⁴ They have both taken jiu-jitsu lessons.²³⁵ They are brothers and co-workers who have previously sparred with each other.²³⁶ When they formed this clause of their contract, they each voluntarily agreed to the dispute resolution clause with full knowledge of their opponent's capabilities.²³⁷ If two people who have not previously fought each other want to enter into a contract with a sport jiu-jitsu dispute resolution clause, the parties will need to take special precautions to make sure that they can demonstrate each is fully aware of the terms and they knowingly and willingly agree to them.²³⁸ Because the

²²⁷ *Id.* ("So what we decided to do is . . . have three five-minute rounds of jiu-jitsu . . ." (*emphasis added*)).

²²⁸ See generally Jory, *supra* note 181.

²²⁹ A trial by battle was invoked by the accused party, and the other party either had to fight or drop the case. *Trial by Combat: West's Encyclopedia of American Law*, *supra* note 11; see, e.g., *Ashford v. Thornton*, *supra* note 16. There was no mutual assent to the term. See *Underhill*, *supra* note 8.

²³⁰ Rocha, *supra* note 7.

²³¹ *Mixed Martial Arts Unified Rules of Conduct*, *supra* note 132.

²³² *Id.*

²³³ Ngai, Levy & Hsu, *supra* note 213.

²³⁴ Sager, *supra* note 7.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See *id.*

²³⁸ See *supra* Part V(D).

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

Fertitta brothers have fought each other before,²³⁹ they each have a full understanding of their opponent. In this situation, there is no additional disclosure necessary.

The contract between the Fertitta brothers specifies that Dana White will be the referee.²⁴⁰ This could create grounds for a challenge due to a conflict of interest. Dana White is the president of UFC and a 9% shareholder in Zuffa, LLC.²⁴¹ In a dispute between the Fertitta brothers, there is a chance that Dana White will be an interested party because he has a large interest in the continued success of the corporation. The Federal Arbitration Act requires the arbitrator to be neutral.²⁴² However, the Uniform Arbitration Act specifies that if the arbitrator is an interested party, the interested arbitrator can still be used under certain conditions.²⁴³ The arbitrator must disclose his relationship and potential or actual conflict of interest to both parties.²⁴⁴

Dana White's full disclosure before the contest is necessary. If this is done, then the Uniform Arbitration Act's requirements will be met.²⁴⁵ Of course, the problem could also be cured if the Fertitta brothers hire a neutral outside referee who has no financial or personal stake in the outcome of the fight. However, the Fertitta brothers may have specified Dana White to be the referee because of the trusted relationship between the Fertitta brothers and Dana White.²⁴⁶ The Fertitta brothers could try to ensure that Dana White does not know the content of the dispute. If Dana White is blind to the respective positions of each party, impartiality would be heightened.

The contract does not mention the use of judges.²⁴⁷ This could run afoul of the *Mixed Martial Arts Unified Rules of Conduct*.²⁴⁸ The contract specifies that there will be three rounds of five minutes and the match will be decided "by submission or points," but the contract does not identify who will tally the

²³⁹ Sager, *supra* note 7.

²⁴⁰ *Id.*

²⁴¹ Meltzer, *supra* note 5.

²⁴² 9 U.S.C. § 10(a)(2) (1925) (forbidding an arbitrator from being partial).

²⁴³ UNIF. ARBITRATION ACT § 11 cmt. 1–2 (2000). Section 11 is completely waivable by the parties. *Id.*

²⁴⁴ *Id.* § 12.

²⁴⁵ *See id.*

²⁴⁶ Parties often choose arbitrators based on the arbitrator's relationship to the parties. *Id.* § 11 cmt. 1.

²⁴⁷ *See* Sager, *supra* note 7.

²⁴⁸ *Mixed Martial Arts Unified Rules of Conduct*, *supra* note 132.

points.²⁴⁹ Judges will be required to determine the winner if the fight does not end by knockout, technical knockout, or submission by the end of the final round.²⁵⁰ Because the contract does not specify who the judges will be, the default rule allows the court to assign judges for the match.²⁵¹ Decisions made by these judges will be binding on the fight.²⁵² If the Fertitta brothers want a particular panel of people to be their judges, they should amend their contract and name the judges to be used during the fight.²⁵³

As long as the Fertitta brothers have these safety and fairness precautions, the dispute resolution clause in their contract should be found valid. The result from their unique and creative dispute resolution clause should be binding on the parties.

VII. CONCLUSION

Resolving disputes with physical force can be a legitimate form of dispute resolution. This method of dispute resolution will succeed where trials by battle and duels have failed. Trials by battle were required to be enforced by the courts, even if the practice was unfair to one of the parties. If one party insisted on this mode of dispute resolution, the other party was forced to risk his life or lose his case. This proved to be an unfair practice because a stronger person could force a weaker person to fight. Resolving disputes with physical force involves both parties mutually and voluntarily agreeing to use that form of dispute resolution. If one party fails to agree, then there is no obligation to resolve disputes via physical force. Duels were performed outside of the rules of law and evolved into an excuse for murder, which led several states to outlaw duels and modern society to shun the practice. Resolving disputes with physical force can be accepted under our laws and can be regulated under the Federal Arbitration Act and the Uniform Arbitration Act. There must be strict safety precautions to ensure that the practice does not turn into an excuse for murder. There must also be fairness precautions that, if not followed, would vacate the decision. The right of parties to agree to resolve disputes with physical force is a unique and legitimate form of dispute resolution that should be permitted and respected by our laws.

²⁴⁹ Sager, *supra* note 7.

²⁵⁰ *Mixed Martial Arts Unified Rules of Conduct*, *supra* note 132.

²⁵¹ UNIF. ARBITRATION ACT § 11 (2000).

²⁵² *Id.*

²⁵³ Section 11 is a default rule and will defer to the contract if judges are named. *Id.*

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

APPENDIX I: TABLE OF DUELING STATUTES

Note: States that have no prohibition on duels appear in bold.

| State | Constitutional prohibition | Statutory Prohibition | Notes |
|-----------------------------|----------------------------|------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Alabama | ALA. CONST. art. IV, § 86. | No | Allows legislature to pass laws to suppress duels, but none exist today. |
| Alaska | No | No | |
| Arizona | No | ARIZ. REV. STAT. § 26-1114 (2011). | Only applies to military. |
| Arkansas | ARK. CONST. art. 19, § 2. | ARK. CODE ANN. § 12-64-836 (2010). | Constitution prohibits duelists from holding office for ten years. Statute only applies to military. Also, a duel participant cannot claim self-defense. <i>Burton v. State</i> , 495 S.W.2d 841 (Ark. 1973). |
| California | No | No | Anti-dueling laws repealed in 1994. 1994 Cal. Stat 270. |
| Colorado | | COLO. REV. STAT. 18-13-104 (2010). | Constitutional prohibition is no longer part of the Colorado constitution. COLO. CONST. art. XII, § 12. |
| Connecticut | No | CONN. GEN. STAT. § 27-251 (2011). | Only applies to military. |
| Delaware | No | No | Cannot claim self-defense if a duel participant. <i>State v. Talley</i> , 14 Del. 417, 33 A. 181 (1886). |
| District of Columbia | No | No | Anti-dueling laws repealed in 2004. 50 D. C. Reg. 10996 (Apr. 29, 2004). The law that repealed the prohibition on duels is called the "Elimination of Outdated Crimes Amendment Act of 2003." |
| Florida | No | No | Anti-dueling laws repealed in 1972. 1972 Laws 72-254. |

| | | | |
|-----------|-------------------------|---------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Georgia | No | GA. CODE ANN. § 38-2-546 (2011). | Only applies to military. Also, duel participants cannot claim self-defense for murder. <i>Hansel v. State</i> , 121 S.E.2d 696 (Ga. Ct. App. 1961). |
| Hawaii | No | HAW. REV. STAT. § 124A-147 (2010). | Only applies to military. |
| Idaho | No | No | Anti-dueling laws repealed in 1972. 1972 Idaho Sess. Laws ch. 381, § 17. |
| Illinois | No | No | Anti-dueling laws repealed in 1996. 1996 P.A. 89-657 § 200. |
| Indiana | No | No | Anti-dueling laws repealed in 1973. 1973 P.L. 325, § 5. |
| Iowa | No | IOWA CODE § 29B.108 (2010). | Constitutional prohibition on dueling repealed. IOWA CONST. amd. 43. Statutory prohibition only applies to military. Additionally, a person cannot claim self-defense from a duel. IOWA CODE § 704.6 (2010). |
| Kansas | No | KAN. STAT. ANN. § 48-3036 (2011). | Only applies to military. |
| Kentucky | KY. CONST. §§ 228, 239. | KY. REV. STAT. ANN. § 437.030 (2010). | Constitutional prohibitions prohibit duel participants from holding office. Statute is a general prohibition on dueling. Statute only prohibiting military from dueling repealed in 1986. 1986 Ky. Acts, ch. 239, § 11. |
| Louisiana | No | No | |
| Maine | No | No | Anti-dueling laws repealed in 1997. 1997 Me. Laws 623 § 2. |
| Maryland | No | No | |

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

| | | | |
|---------------|----|-----------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Massachusetts | No | MASS. GEN. LAWS ANN. ch. 265 §§ 3-4 (2010). | A principal who kills another principal is guilty of murder. |
| Michigan | No | MICH. COMP. LAWS § 750.171–750.173, 750.319 (2011). | The statute that criminalized challenging a person to a duel was repealed. 2010-96 MICH. PUB. ACTS § 1. It is still a crime to accept a challenge to a duel. Also, a person is guilty of a misdemeanor if the person publishes another person's refusal of a challenge. Mich. Comp. Laws § 750.173 (2011). |
| Minnesota | No | No | Prohibition only applied to military and was repealed in 1978. 1978 Minn. Sess. Law Serv. 552 § 48 (West). |
| Mississippi | No | MISS. CODE ANN. § 97-39-1 (2010). | Additionally, a person is guilty of a misdemeanor if the person publishes another person's refusal of a challenge. Miss. Code Ann. § 97-39-7. |
| Missouri | No | MO. REV. STAT. § 40.385 (2011); | Statute designed to suppress dueling was repealed in 1977. 1977 Mo. Legis. Serv. 658. Remaining statute only applies to military. |
| Montana | No | No | No ban on duels, but "If a person slays or permanently disables another person in a duel in this state . . . the party is liable for and shall pay all debts of the person slain or permanently disabled." MONT. CODE ANN. §27-1-223 (2009). |
| Nebraska | No | No | |
| Nevada | No | NEV. REV. STAT. ANN. § 200.410 (2011). | Also, a person is guilty of a gross misdemeanor if they publish another's refusal to accept a challenge. NEV. |

| | | | |
|-----------------------|----|-----------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | | | REV. STAT. ANN. § 200.440 (2011). |
| New Hampshire | No | No | |
| New Jersey | No | No | Anti-dueling laws repealed in 1978. 1978 N.J. Laws c. 95, § 2C:98-2. |
| New Mexico | No | N.M. STAT. ANN. § 30-20-11 (2010); N.M. STAT. ANN. § 20-12-68 (2010). | The first statute is a general ban on dueling. The second statute applies to military only. |
| New York | No | N.Y. MILITARY LAW § 130.108 (2010); 1816 N.Y. Laws session 40, ch. 1. | First statute applies to military only. Session laws prevent a duel participant from holding office. <i>Barker v. People</i> , 3 Cow. 686 (1824). A principal in a duel cannot claim self-defense for killing the other principal. NY PENAL LAW § 35.15 (2011). |
| North Carolina | No | No | Anti-dueling laws repealed in 1993 and 1994. 1993, N.C. Sess. Laws c. 767, § 29(1); 1994 N.C. Sess. Laws c. 14, §§ 72, 73. |
| Ohio | No | OHIO REV. CODE ANN. § 5924.114 (2011). | Constitutional prohibition is from a former Ohio constitution that was in effect from 1851 to 1976. OHIO CONST. of 1851 art. XV § 5. The current Ohio constitution does not have a prohibition on dueling. Statutory general prohibition on dueling repealed in 2000. S.B. 107, 123rd Gen. Assm. (Ohio 1999). Remaining statute only applies to military. |
| Oklahoma | No | OKLA. STAT. ANN. tit. 21 § 662 (2010); | First statute general prohibition of duels, second statute applies to military |

PHYSICAL FORCE IS A LEGITIMATE FORM OF DISPUTE RESOLUTION

| | | | |
|----------------|------------------------------|---------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | | OKLA. STAT. ANN. tit 44 § 3370 (2010). | only. Even if opponent is not wounded, principles can be sentenced up to ten years in prison for participating in a duel. |
| Oregon | OR. CONST. art. II, § 9. | OR. REV. STAT. ANN. § 398.393 (2011). | Constitution prohibits duel participants from holding office, trust, or profit. Statute only applies to military. |
| Pennsylvania | No | 51 PA. CONS.STAT. ANN. § 6036 (2010). | Only applies to military. |
| Rhode Island | No | R.I. GEN. LAWS § 11-12-1 (2010); R.I. GEN. LAWS § 30-13-112 (2010). | First statute general ban, second statute applies to military only. |
| South Carolina | S.C. CONST. art. XVII, § 1B. | No | Constitution prohibits duel participants from holding office. Statutory prohibition of duels repealed in 2010, but related statutes to duels were not repealed. 2010 Act No. 273, § 22 (2010). For example, duels are legal, but it is unlawful to challenge or accept a duel with a deadly weapons. S.C. CODE ANN. § 16-3-410 (2010). It is also illegal to serve as a second, punishable up to two years in prison. S.C. CODE ANN. § 16-3-420 (2010). |
| South Dakota | No | No | Anti-dueling laws repealed in 1976. 1976 S.L. ch. 158 § 16-9. |
| Tennessee | TENN. CONST. art. IX, § 3. | No | Prohibits duel participants from holding office. |
| Texas | No | No | Texas Constitution of 1845 prohibited duel participants |

| | | | |
|-----------------|---------------------------|-------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | | | from holding office. TEXAS CONST. of 1845 art. 7 § 1. This clause is no longer in the Texas constitution. |
| Utah | No | No | “Consensual altercation” is no defense to an unlawful killing. UTAH CODE ANN. § 76-5-104 (2010). |
| Vermont | No | No | |
| Virginia | No | No | While there is no ban on dueling, Virginia’s fighting words statute was designed to prevent duels. W.T. Grant Co. v. Owens, 141 S.E. 860 (Va. Ct. App. 1928). |
| Washington | No | WASH. REV. CODE § 38.38.768 (2011). | General prohibition on dueling repealed in 1975. 1975 Laws Ch. 260, § 9A. Remaining prohibition only applies to military. |
| West Virginia | W. VA. CONST. art 4 § 10. | W. VA. CODE § 6-5-7 (2011); W. VA. CODE § 15-1E-114 (2011); | Constitution and first statute prohibit duel participants from holding office, trust, or profit, second statute only applies to military. General ban on dueling repealed in 2010. 2010 Acts, c. 34. |
| Wisconsin | No | WIS. STAT. § 322.114 (2011). | Statute only applies to military. Constitutional ban on duels repealed in 1975. 1973 J.R. 10, 1975 J.R. 4, vote April 1975. |
| Wyoming | No | No | |